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No 15-6418

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

GREGORY WELCH, PETITIONER

v

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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The court of appeals denied petitioner a certificate of appealability under 28 U.S.C. 2253(c) on his claim that he was not properly sentenced under the Armed Career Criminal Act of 1984 (ACCA), 18 U S C. 924(e)(2) Pet App 1 In his petition for a writ of certiorari, petitioner contends (Pet 5-8) that his ACCA sentence was invalid under this Court's decision in Johnson v United States, 135 S Ct 2551 (2015) In Johnson, the Court held that the ACCA's residual clause, 18 U S C 924(e)(2)(B)(ii), is void for vagueness, and, therefore, imposing an increased sentence under the residual clause "violates the Constitution's guarantee of due process " 135 S Ct at 2563 As petitioner notes (Pet

6), the court of appeals relied on the residual clause in rejecting petitioner's challenge to his ACCA sentence on direct appeal See United States v Welch, 683 F 3d 1304, 1310-1314 (11th Cir 2012) (assuming that petitioner's prior robbery conviction occurred when "mere snatching" with "any degree of force" was sufficient to constitute robbery under Florida law and holding that robbery offense qualified as a violent felony under ACCA's residual clause), cert denied, 133 S. Ct 913 (2013)

The court of appeals' unpublished order denying a certificate of appealability, which was issued before this Court's decision in Johnson, does not warrant plenary review Petitioner correctly notes (Pet 8) that there is a circuit conflict concerning whether this Court has "made" Johnson retroactive for purposes of the gatekeeping provision of 28 U.S.C. 2255, which permits a court of appeals to authorize the filing of a successive motion under Section 2255 if the motion relies on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S C. 2255(h)(2); compare, e.g., Price v United States, 795 F 3d 731, 734-735 (7th Cir 2015) (Johnson announced a new substantive rule that has therefore been "made" retroactive to cases on collateral review), with In re Rivero, 797 F 3d 986, 989-990 (11th Cir 2015) (Johnson announced a new substantive rule of constitutional law, but this Court has not made Johnson retroactive to cases on collateral

review) This case does not implicate that conflict, however, because petitioner seeks review of the denial of his first Section 2255 motion. Accordingly, the appropriate disposition is to grant certiorari, vacate the judgment of the court of appeals, and remand the case for further consideration in light of Johnson.*

DONALD B VERRILLI, JR.
Solicitor General
Counsel of Record

DECEMBER 2015

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* The government waives any further response until so ordered by the Court

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CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served with copies of the MEMORANDUM FOR THE UNITED STATES, by first-class mail, postage prepaid, this 3rd day of December, 2015.

[See Attached Service List]

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December 3, 2015

Due to the continuing delay in receiving incoming mail at the Department of Justice, in addition to mailing your brief via first-class mail, we would appreciate a fax or email copy of your brief. If that is acceptable to you, please fax your brief to Charlene Goodwin, Supervisor, Case Management Specialist, Office of the Solicitor General, at (202) 514-8844, or email at SupremeCtBriefs@USDOJ.gov. Ms. Goodwin's phone number is (202) 514-2217 or 2218. Thank you for your consideration of this request.

15-6418
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